Datuk Harris Bin Mohd Salleh v Seck Mun Foo

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S–02–543 OF 1996
NH CHAN, ABU MANSOR AND AHMAD FAIRUZ JJCA
10 APRIL 1999

Civil Procedure *— Appeal — Facts, inferences from — Whether trial judge erred in his inferences and finding of facts — Whether there was sufficient evidence for trial judge to reach his finding*

This case concerned a piece of land ('the land') upon which was situated the Labuan Golf Club ('the club'). The land was registered in the name of the appellant. In the High Court below, the respondent had sought for the transfer of the land from the appellant to the club. The application was allowed by the High Court and the appellant appealed, the main contention being that the trial judge had erred in his inferences and finding of facts.

Held, dismissing the appeal:
There was sufficient evidence for the trial judge to come to a finding that the land was intended to be a gift to the club although it was still registered in the name of the appellant, such as: (i) the intention demonstrated by the appellant to transfer the land to the club when he signed the transfer and delivered it to the club (see p 445B–C); (ii) the fact that the transfer, if it had succeeded, would have been a transfer from the appellant to himself as trustee (see p 445F–G); and (iii) the connection between the timber concession given to Syarikat Berdikari/Syarikat Tambisan and the building of the club, and that there existed a sale transaction that involved Berdikari/Tambisan and the appellant (see pp 445H–446D).

[Bahasa Malaysia summary

Kes ini adalah berkenaan dengan sebidang tanah ('tanah tersebut') yang terletak di Kelab Golf Labuan ('kelab tersebut'). Tanah tersebut telah didaftarkan di dalam nama perayu. Di peringkat perbicaraan di Mahkamah Tinggi, respondent telah meminta untuk memindah milik tanah perayu kepada kelab tersebut. Permohonan tersebut telah dibenarkan oleh Mahkamah Tinggi dan perayu telah merayu, hujahan utamanya adalah bahawa hakim perbicaraan telah silap dalam inferensnya dan penemuan fakta-fakta.

Diputuskan, menolak rayuan:
Terdapat keterangan yang mencukupi bagi hakim yang perbicaraan untuk sampai ke suatu penemuan bahawa tanah tersebut diniatkan sebagai hadiah kepada kelab tersebut walaupun ia masih didaftarkan di dalam nama perayu, seperti: (i) niat yang yang ditunjukkan oleh perayu untuk pindahmilik tanah kepada kelab tersebut semasa beliau

menandatangani pindahmilik dan menyerahkannya kepada kelab tersebut (lihat ms 445B–C); (ii) fakta bahawa pindahmilik tersebut, sekiranya ia berjaya, akan menjadi pindah milik daripada perayu kepada dirinya sendiri sebagai pemegang amanah (lihat ms 445F–G); dan (iii) pertalian antara konsesi balak yang diberikan kepada Syarikat Berdikari/Syarikat Tambisan dan pembinaan kelab tersebut, dan bahawa wujudnya suatu transaksi jualan yang melibatkan Berdikari/Tambisan dan perayu (lihat ms 445H–446D).

Notes

For a case on inferences from facts, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 611–615.

Cases referred to

Laurie v Raglan Building Co Ltd [1942] 1 KB 152 (refd)
Simirah v Chua Hock Lee & Anor [1963] MLJ 239 (refd)
Yuill v Yuill [1945] P 15 (refd)

Appeal from: Civil Suit No 45 of 1991 (High Court, Labuan)

Manit Singh (*Colin Lau* with him) (*Colin Lau & Co*) for the appellant.
CV Das (*Robin Ch'ng* and *Steven Thiru* with him) (*Robin Ch'ng & Associates*) for the respondent.

Abu Mansor JCA (delivering judgment of the court): We heard substantive arguments after which we adjourned this matter for judgment to a date to be fixed.

The facts of the case

The facts of this case are as follows. The present respondent was the plaintiff and the appellant was the defendant in the court below. The plaintiff was officiating as the President of Kelab Golf Labuan ('the club') at the time of the writ. The defendant/appellant was the registered owner of a piece of land under Town Lease No 207512589 ('the said land').

By a writ dated 15 April 1991, at the High Court, Labuan (amended on 20 August 1991) the respondent/plaintiff prayed for several orders, inter alia: (1) a declaration that the defendant/appellant held the said land on trust for and on behalf of the club; (2) a declaration that the defendant/appellant has no right to the ownership of the said land; and (3) an order cancelling the defendant/appellant's name in the title to the said land and that the club be registered instead.

The High Court allowed the plaintiff/respondent's application after a lengthy hearing and the appellant/defendant, being dissatisfied with the High Court's decision, appealed to us.

The plaintiff's case

In the court below the plaintiff pleaded that the defendant was a bare trustee and held the said land on trust for the said club. For the defendant, it was

said that there was an absence of evidence before the court that the defendant had been paid any money or any consideration for the said land or that the defendant had in any way been compensated for the said land by the plaintiff or anyone else on his behalf. The only evidence before the court, if it is evidence, is the evidence of a donation of RM1.6m made by Syarikat Berdikari (Berdikari) and Syarikat Tambisan (Tambisan) through the Sabah Sports Council, to the Labuan District Council or to the contractor, Syarikat Jati who eventually built the golf course. The plaintiff urged the court to infer from the sum total of the evidence before it that the defendant must have been paid for the said land. That in essence is the plaintiff's case. The plaintiff also contended that there was no evidence as to how the defendant acquired the land or as to how he became the registered proprietor.

The history of the said land

What then is the history of the said land that would entitle the plaintiff to make the present application, to say that the defendant holds the said land under bare trust for the club?

For a start, we must turn to the record of appeal Jilid 2 p 992 and to the Register Memorial No 110180 (07). The said land was originally registered in the name of Yap Hyun Phen ('Mr Yap'). The said land was, on that date, transferred to the defendant.

It is necessary for us to take a step backward and ask the relevant question. Where did Mr Yap get the said land? This is not a matter of dispute since the records are clear. This land was originally jungle state land and it was not also unreasonable to infer that the state alienated this land to Mr Yap for a certain purpose which purpose becomes very clear as this story unfolds but it is not difficult to see that Mr Yap also held the said land so as to have it transferred to the defendant. So learned counsel's statement from the Bar that the defendant did not get the land from the State was to a certain extent true as it went.

Learned counsel for the appellant submitted before us that even if the donation was to be read as the price, the consideration for the said land, there is no evidence how the Sports Council applied the donation or how the donation was disbursed. Counsel contended that it is for the plaintiff to supply the missing link before the plaintiff can succeed in this application for the declaration.

This submission led the learned chairman of the panel of judges, NH Chan JCA, to interpose to say that consideration can be in kind. It need not be in cash. He quite rightly suggested that there can be an arrangement.

This comment from the learned judge elicited a statement from Mr Manjit Singh, for the appellant, that it was true between 1973 to 1985 the defendant wanted to give this land as a gift to the club. Why the change of mind now? Or could the defendant be permitted to change his mind bearing in mind if the said land was originally intended or meant and alienated for the club?

Was there evidence or enough evidence that entitled the lower court, after looking at the circumstances as a whole, to come to a finding on the totality of the evidence that the said land, though registered in the name of the defendant, was intended to be a gift for the club?

The statement from the Bar by learned counsel for the appellant that between 1973–1985 that the defendant wanted to give this land as a gift to the club is to be found in the appeal record in Bahagian B Jilid 2 at p 196 where the defendant had in fact signed a transfer and delivered the said signed transfer to the said club to effect the gift of the said land to the said golf club but unfortunately, it did not detract the intention of the giver behind the gift, the gift could not be perfected by registration of the transfer as the golf club could not pay the stamp duty of RM600,000 and the gift remained unperfected but the record is clear.

Page 200 Bahagian B Jilid 2 of the record of appeal confirms that the transfer of the said land was signed on 29 August 1984 when the defendant was officiating, no less a personage, as the Chief Minister of Sabah. Page 201 of the said appeal record gives us who the trustees of the said club were. From the evidence of Christopher Chin ('PW5'), this was elicited in evidence:

> Q: You say that you act on behalf of the trustees of Labuan Golf Club. Can you tell us who the trustees were at that time (29 August1984)?
>
> A: Based on the copy of the club constitution made available to me, the trustees were Datuk Harris and Wong Chik Lim.

It is not disputed from the appeal record, the story went, that an attempt was made to get an exemption from the Finance Ministry for the payment of the stamp duty of RM600,000 for the transfer of the said land to the club. When it was refused and it had to pay, the club was in no position to do so.

It may be said that the transfer, no doubt aborted, if it had succeeded, would have been a transfer from the defendant, a bare trustee, to the defendant as a trustee of the club. At the risk of repeating, it cannot be forgotten that at the time of the intended transfer the defendant officiated as the Chief Minister of Sabah. One may well ask if the said land was not for the golf club whether the transfer would be signed by him?

At p 18 of the record of appeal, para 17 the learned trial judge held:

> I agree with the plaintiff's counsel that these documents show the connection between the timber concession and the building of the LGC on the land and the connection between Berdikari, Tambisan and the defendant. These documents also infer that there existed a sale transaction that involved Berdikari or Tambisan and the defendant where the defendant was paid off for the land.

Before us the appellant's counsel submitted that the learned trial judge erred in making the above inferences on the evidence on the documents tendered before him.

The appellant's counsel further contended that there is absence of any evidence to support the above findings of the learned judge.

In order that we may decide whether the learned judge had erred or otherwise in making such findings, it is necessary that we should set out in detail the preceding paragraph of the judgment of the learned judge from para 16 of his careful judgment where he said:

16 I can do no better than quote the submission by the plaintiff's counsel and the list of documentary evidence relied on by the plaintiff in support of this contention:

(2) The connection between the Timber Concession to Syarikat Berdikari, the logging by Tambisan Sdn Bhd and the building of the Labuan Golf Club.

.1 This connection is made abundantly clear by the documentary and oral evidence given in court. In this it is also material to note the time sequences, namely, the giving of the timber concession, the working of the concession and the building of the golf club, all of which took place between 1972 and 1975.

.2 The following documents tendered in court, and duly marked as exhibits, show clearly the connection between the timber concession and the building of the golf club on the defendant's land; the connection between Syarikat Berdikari and Tambisan Sdn Bhd; and the involvement of the defendant:

25.7.72: Syarikat Berdikari Board Meeting decides to apply for timber concession and in return to build a 9-hole golf course on Lot TG 412 in Labuan.

Note the following:

(a) present are inter alia, Hussein Wahid Dally, Datuk Mohd Din, Haji Ali Green and Shamsuddin bin Assim;

(b) TG 412, the land registered in the name of the defendant, already identified as the land for the golf course (see exh P8).

7.8.72: Syarikat Berdikari's letter to Jabatan Hasil Bumi making their application, with offer to build golf course, and enclosing above Board minutes.

Note:

(a) Lot 412 specifically identified for golf course;

(b) golf land cost specifically stated to be RM1,137,500;

(c) building cost said to be RM874,500 (see exh P7).

12.8.72: Jabatan Hasil Bumi gives approval for additional 9,000 acres timber land on express conditions contained in Syarikat Berdikari's application letter (see exh P6).

20.11.72: Jabatan Hutan writes to Syarikat Berdikari giving 7,000 acres timber land at Tambisan area, Sandakan (see exh P55).

22.12.72: Jabatan Hutan writes again to Syarikat Berdikari giving additional 2,000 acres 'supaya tuan dapat memenohi membuat satu Compleks Golf bertaraf antarabangsa di Labuan'.

Note:

(a) letter is captioned 'Kompleks Golf Labuan' (see exh P60).

21.2.73: Jabatan Hutan writes to defendant giving 'photo interpretation of the area at Tambisan for Berdikari'.

Note:

(a) the photo map is sent to defendant 'as requested' (see exh P61).

27.2.73: Syarikat Berdikari Board meeting deciding to assign the logging licence to 'newly established company' Tambisan Sdn Bhd.

Note:

(a) present are Hussein Wahid Dally, Datuk Mohd Din (Chair), Haji Ali Green and Shamsuddin Assim;

(b) the assignment is recorded as for 'convenience in income tax computation purposes' (see exh P56).

1.3.73: Syarikat Berdikari writes to Jabatan Hutan for licence to be issued in name of Tambisan Sdn Bhd stating 'we have established a new company in the name of Tambisan Sdn Bhd to carry out logging on behalf of Syarikat Berdikari.

Note:

(a) letter is captioned 'fund for Labuan Golf Club';

(b) letter signed by Hussein Wahid Dally (PW3) as Managing Director;

(c) purpose is stated to be for tax purposes (see exh P9);

(d) Tambisan Sdn Bhd is a RM2 company with Tan Sri Wong Chik Lim as principal Director and shareholder (see exh P19).

3.3.73: Syarikat Berdikari writes again to Jabatan Hutan forwarding minutes of Board meeting on logging licence for Tambisan Sdn Bhd.

Note:

(a) letter is captioned 'fund for Labuan Golf Club' and signed by Hussein Wahid Dally (PW3) (see exh P63).

5.3.73: Jabatan Hutan replies to Syarikat Berdikari declining to issue licence in the name of Tambisan Sdn Bhd but suggesting that Power of Attorney be given (see exh P58).

14.3.73: Chief Minister's Department writes to Jabatan Hutan stating that licence could be issued in the name of Tambisan Sdn Bhd 'oleh sebab Syarikat itu ialah satu Syarikat "associate" dengan Syarikat Berdikari Sdn Bhd' (see exh P62).

20.3.73: Jabatan Hutan writes to Tambisan Sdn Bhd stating that Government has agreed to issue licence in its name as 'an associate' of Syarikat Berdikari (see exh P57).

If we may pause here temporarily, perhaps we cannot help but notice and cannot but infer the unseen hand of the defendant in the approval of this timber licence. The judge then continued:

23.3.73: Tambisan Sdn Bhd writes to Jabatan Hasil Bumi thanking them for approval of the 11,000 acres of timber 'for the Labuan Golf Course fund'. Letter states further that 'the Labuan Golf Course Project is under way' and ask for an additional 1,000 acres as 'we are presently short of funds'.

Note:

(a) letter is captioned 'fund for Labuan Golf Course'.

(b) letter is signed by Tan Sri Wong Chik Lim as Chairman (see also evidence of Victor Wong (PW9) on this).

(c) letter is copied to Syarikat Berdikari (see exh P15).

The record continues:

10.5.73: Licence issued to Tambisan Sdn Bhd (see exh P66).

18.8.73: Note in the file of Registrar of Societies records defendant as pressing for registration of Labuan Golf Club 'because the club has bought some properties and is now negotiating another piece of land to be purchased in the name of a committee member first, as the club has not been registered yet' (see exh P50).

...

(i) Exhibit P10: letter dated 11 September 1975 from Syarikat Berdikari to defendant reiterating their letter of 7 August 1972 to Jabatan Hasil Bumi promising to build the golf course in return for the timber concession..

(ii) Exhibit P11: letter dated 25 November 1975 from Syarikat Berdikari to Chief Minister's Department stating: 'we applied for a timber licence from the State Government on the condition that we will build a golf course complex for the Golf Club Labuan, and it was on this condition that the State Government approved and granted us the special timber licence'.

(iii) Exhibit P14 letter dated 11 October 1990 from the defendant to Dato Mohd Din of Syarikat Berdikari under caption 'Tanah TL 207512589 — Labuan Golf Club' stating: 'Saya suka menarik perhatian saudara kepada tahun 1972 hingga tahun 1975 di mana kita semua berusaha untuk mendapatkan kawasan kayu balak dan seterusnya menggunakan wang tersebut untuk pembangunan 9-lubang golf club'.

Apart from the above documents and evidences in paras 18 and 19 of the learned judge's grounds of judgment read: which incidentally told the story further how this golf course was financed and paid for and effectively and powerfully answering the learned appellant's counsel's submission that, so-called, there was absence of any evidence of payment, consideration set off against the defendant. We set down paras 18 and 19 of the same judgment as follows:

18 P7 shows the application for the said 9,000 acres.

19 Hussein Wahid Dally (PW3), a Director of Berdikari, gave evidence that Berdikari did apply for a 9,000 acres timber concession from the State Government by way of letter (P7). PW3 also confirmed that in return for the 9,000 acres Berdikari proposed to build a 9-hole golf course in Labuan together with a club house, a swimming pool and a tennis court. PW3 also confirmed that Tambisan was to do the logging, sale of logs and also to be in charge of the funds derived from the sale of logs.

Our answer to the appellant's counsel's contention of absence of evidence is this: at p 19 of the appeal record, in his long judgment, the learned judge

find as a fact from documents tendered before him that there was a sale transaction of the said land between Berdikari/Tambisan, the two development companies, and the defendant.

In P7, the learned judge also found as a fact that the land cost was stated to be RM1,137,500 whilst the cost of constructing the golf course was RM874,500. In p 19 of the appeal record the learned judge found from letter P10 dated 11 September 1975, from PW3 to the defendant, that the land was bought from the defendant. PW3 also testified that he would not have signed P10 if it was not true.

The learned judge in his grounds of judgment, on p 19 of the record of appeal, made this comment:

> An extract from P10 is:
>
> > 'You will remember that when we negotiate to purchase your land for the golf course, it was made clear to you that we are purchasing this land for the golf course on behalf of the Labuan golf course ... we hereby request that with immediate effect to enter into an irrevocable agreement to transfer the said land purchased by us to the Labuan Golf Course, an area of 74 acres as agreed by you.'
>
> PW3 also said in evidence:
>
> Q: I think we can help you by looking at your own letter, this is IDP10, last paragraph. Can we take it that by September 1975 the land had been purchased?
>
> A: By September 1975, I think we had purchased the land by this date.
>
> Q: Can you tell us how much was the land bought for?
>
> A: RM1,137,500.

Here, from the above evidence the learned judge again answered the defence contention of absence of evidence when he said:

> The defence contends that the evidence of PW3 cannot be relied on because PW3 does not know if the defendant had in fact been paid for the land. It is also submitted by the defence that the evidence of PW3 is inconsistent and contradicts his evidence contained in P13 and P14, and therefore, unreliable.

After setting out the evidence given by PW3 the learned judge held at p 20 of the judgment that the testimony of PW3 showed that he knew that the defendant was paid for the land to the tune of RM1,137,500 but PW3 was not sure of the details of the transaction by which the land was sold because he said, the transaction was handled by Tan Sri Wong Chik Lim, Chairman of Tambisan. The learned judge said he would hardly call that evidence inconsistent or contradictory. Then in exhibits P12 and P13 tendered to him it showed that Berdikari through PW3 and Datuk Mohd Din the director of the company, maintained that the said land was purchased from the defendant.

Before us counsel for the appellant contended that from pp 87–92 are the further particulars filed and it was the plaintiff's case that payment was either from the proceeds of timber sale or some set off or accounting adjustment to the defendant from the proceeds of timber for period from 1972 to 1975 to the sum of RM1 million.

Appellant's counsel also contended that the judge's finding was contrary to the plaintiff's pleaded case. With respect to the learned counsel, we have considered this submission and we think there is no merit in this contention.

Then there is the contention of the learned counsel for the appellant that minute P50 at p 1135 of the appeal record should not have been admitted by the learned judge. The minute was in the relevant file and in the following terms:

> Note
>
> DO Labuan rang up to enquire about the registration of this club as Datuk Harris was pressing him to get this club registered as soon as possible — within 3 weeks if possible — because the club has bought some property and is now negotiating another piece of land to be purchased in the name of a committee member first, as the club has not been registered yet.
>
> sgd
> 18 August 1973

The contention of counsel is that the minute should have been excluded as the minute had been made by an unknown person. We find no merit in this as it was made at the time approximately this transaction was made, and tendered, at most, recording the actual fact that there was a phone call from District Officer Labuan even if it is not tendered for the specific purpose to prove the truth of the statement. It was a note found in a file of the relevant department of Government, the Registrar of Societies, on a matter pertinent to the work of the said department of registering a club, as to an enquiry whether the Labuan Golf Club had been registered. We think the minute is admissible as it is 20 years old and found in a relevant government department file dealing with the relevant departmental matters. The fact that the author was not named does not make the minute any the less admissible.

Mr Manjit Singh also drew the court's attention to the fact that the lands mentioned in the Borang 1, Permohonan Untuk Pendaftaran Pertubuhan at p 1132 of the appeal record, in particular 5L346 and 5L347 were not the lands belonging to the defendant.

The appellant's counsel's submits that the learned judge had erred when he held at p 27 of the appeal record:

> (b) It is interesting to note that in the club's application for registration as a society, two pieces of property were mentioned, mainly SL346 for the 'Bangunan golf' (see P49), and SL346 eventually becoming part of Grant No 20790412, the predecessor title to the land (see P46).

Mr Manjit Singh referred us to p 1132 of the appeal record where the learned judge found that reference. In p 1132 of the record of appeal the two lands were:

> (a) Bangunan Kelab Labuan — SL346;
>
> (b) Padang Golf Labuan — SL347.

Mr Manjit went on to contend that the learned judge had erred in describing the land as SL346 only.

A We are of the view the error is insignificant and petty and occurred in quoting the number of the title. It would be a serious error if the numbers were the only details quoted but the form bore the description of the two pieces of land concerned as well, though their numbers were in error. There was then therefore no ambiguity. The land which was in actual fact pleaded by the plaintiff had been numbered SL393 at p 989 which was part of Grant B No 20790412 at p 1132 of the appeal record. We hold the mistake in giving the lot number to be of no consequence when the land has been sufficiently identified.

After having had the advantage of perusing all the evidence before him and looking at the plaintiff's case as a whole, the learned judge concluded C in para 29 and para 30 of his grounds of judgment at p 21 of the appeal record.

> 29 With respect, a person who has parted with his land and has received the purchase money as the defendant was in the present case is merely a bare trustee of the land. His name may appear on the land title but he may assert no legal rights over it because the equitable and beneficial D ownership has passed to the buyer. Since the plaintiffs have proved that the defendant has sold the land to Berdikari the defendant is only a bare trustee of the land eventhough his name still appears on the land title. I have for my guidance the case of *Kuruppiah Chettiar* [1971] 2 MLJ 116 where it was held that the registered proprietor having sold his entire interest in the land and received payment in full held the legal estate only E as a bare trustee for the respondent who was the equitable owner, also *Temenggong Securities Ltd & Anor v Registrar of Titles Johore & Ors* [1974] 2 MLJ 45.
>
> 30 Thus the defendant having sold the land to the plaintiffs, albeit in a circuitous manner is now a bare trustee for the plaintiffs, a fortiori the circuitous manner how Tambisan, the defendant and the building of the F LGC are inter-connected with the 'Tambisan Donation'.

The learned trial judge also found as a fact that Tambisan, the defendant and the club are all interconnected with the 'Tambisan Donation' so-called. At pp 21–22 of the appeal record, para 30 of his judgment, he sets as follows:

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> 31 Victor Wong @ Wong Ket Sing (PW9), a past Director of Tambisan, testified to show the connection between Tambisan and the LGC:
>
> Q: How does ST, in what way was ST building the LGC?
>
> A: As far as I can remember there was some arrangement whereby some funds were to be given to LGC so that they can take over the timber H land, fund to be given to LGC by ST, so that ST can take over the timber land.
>
> Q: Can you make it clear what you mean ST take over the timber land?
>
> A: That is the timber licence to be issued to ST.
>
> 32 PW9 further said in evidence:
>
> I Q: If as you say donations were to go to Labuan Golf Club, where would one fit that in the statement of accounts?
>
> A: There is, in the accounts there is no mention of LGC because all the donation has been channeled to the Sabah Sports Council.

33 This is confirmed by John Liaw Chee Shing (PW6), a Public Accountant, who audited Tambisan's accounts. PW6 said that the audited accounts of Tambisan for the year ended 31 December 1974 showed a donation of RM1,682,160 to 'Sports Council' leaving a debit balance of RM392,118 (see P21 and P22). PW6 is of the view that it is abnormal for a company to give away 99.52% of its profits as donation.

34 PW9 confirms that the RM1,670,000 less 5% to the Sports Council was meant for the LGC. PW9 also testified that the money was remitted to Labuan also through the Labuan District Council direct to the LGC or to the main contractor of the LGC, that is, Jati (Malaysia Timur) Sdn Bhd. It is also PW9's testimony that he (PW6) signed remittance slips for periodic payments to Jati based on instructions of the defendant and by the Chairman or Directors of Tambisan:

Q: You remitted the money?

A: I am not directly involved in the remittance usually by the Accountant but I am involved in the signing of the remittance slips.

35 PW9 further said in evidence:

Q: The name of the contractor is Jati (Malaysia Timur) Sdn Bhd?

A: Yes.

Q: What was the ... between Tambisan and these recipients in Labuan, whether the club, contractor or District Council know, would you know when to send, how much to send?

A: Based on instructions I received from defendant sometimes from the Chairman or Directors.

Q: You remitted the money?

A: I am not directly involved in the remittance, usually by the Accountant but I am involved in the signing of the remittance slips.

36 Jim Rajaratnam (PW8), a Consultant Engineer, testified that the defendant as the Co-ordinator of the LGC project has enough clout to arrange finance and to ensure works are carried out.

Q: What in your opinion or perception was the role of the Co-ordinator in this project?

A: To arrange finance and to ensure the work was carried out.

37 There is evidence to show that the defendant authorized payments of major expenditures. Even if payments were made through the Labuan District Office, copies of statement of accounts were sent to the defendant on a regular basis (see P26, P33, P34, P35, P27, P30).

38 The accounts of Jati showed receipt of RM334,339.98 in 1974 where none was shown in the previous year (see P54B). P25 which is Statement of Account from the Labuan District Office shows payment made to Jati for the sum of RM80,000 which is not shown in Jati's 1973 account.

39 It is the submission of the plaintiffs' counsel that when the two above sums are added together, the total sum is RM414,339.98 which is close to the architect's assessment of the cost of the LGC project of RM418,095.50 (see P40). P40 alone shows that the total expenditure including the work done by Jati amounted to RM720,991.90. It is submitted by the plaintiffs' counsel that out of the Tambisan Donation there are two possible sums unaccounted for, that is either

RM1,234,256.60 or RM949,008.91. The plaintiffs' counsel thus question what happened to these sums.

40 The submission by counsel for the defendant in answer to the above is that while the submission by the plaintiffs' counsel may have covered matters such as the flow of funds, the role of Tambisan, the defendant as Co-ordinator, the Labuan District Office and Jati there was no submission by the plaintiffs' counsel on any payment to the defendant for the land.

41 That may be so. But the plaintiffs have adduced evidence to show how the donation from Tambisan eventually was used to build the LGC.

42 Further, PW8 testified that the defendant was the person dealing with Tambisan for the purpose of financing the building of the LGC. PW8 said in evidence:

Q: Would it be right Datuk Harris was the person who dealt with Tambisan for the purpose of financing the building of the golf course?

A: I would say so.

43 PW8 even wrote to the District Office to request that the District Office pay RM70,000 to one Shamsuddin bin Assim since the defendant had approved the payments for some work done for the LGC (see P33, P34, P35, P27, P38 and P30).

After having perused the judgment of the learned judge so far we find he was entitled, as he did, to make the following conclusion at p 25 of the appeal record and, with respect, we say that the conclusion was based on the evidence as found by him at para 44 of his judgment:

44 There is even evidence that the defendant would give instructions to Tan Sri Wong Chik Lim, Chairman of Tambisan, authorizing Tan Sri Wong to make payments to anyone. An example is the payment to PW8 who was paid RM10,000 by Tan Sri Wong on the instruction of the defendant, which payment was later regarded as payment on behalf of the LGC (see P30, exh 31 and P32).

45 From the evidence above it is clear that the defendant had a large say in the building of LGC and it would be reasonable to infer that the defendant knew or should be able to explain the whereabouts of the missing RMl,234,256.60 or RM949,008.91 from the 'Tambisan Donation'.

We find the learned judge correctly approached a number of very telling evidence before him, calling for the defendant's explanation, which facts or evidence if they remain explained must be interpreted or taken to be unexplanable. He said at para 46 at p 25 of his judgment as follows:

46 After going through all the oral and documentary evidence, with respect, I agree with the submission by the plaintiffs' counsel that there are many questions to be answered by the defendant, unanswered by the defendant. I can do no better than to reproduce some of the questions raised by the plaintiffs' counsel for the defendant to answer:

(6) Why the defendant has to answer?

1. The plaintiff submits that on the oral and documentary

evidence presented to court, the defendant has to answer on the following questions raised from the circumstances and events established:

(1) How was it possible for Syarikat Berdikari to identify the defendant's land as the land on which the golf course was to be built when they first made the application for the timber concession on 7 August 1972 (see exhs P7 and P8)?

(2) The defendant admits in his statement of defence that he was aware that Syarikat Berdikari had identified his land to the State Government for the building of the golf course (see para 1(f) of the re-amended statement of defence). If so, what was the arrangement between the defendant and Syarikat Berdikari that they should be allowed to use 74 acres of valuable land for a golf course in return for a timber concession?'

There were also other telling evidence which also call for the defendant's explanation as follows:

(1) If no sale transaction took place between Berdikari and the defendant why did the defendant write P14 proposing to cancel the agreement?

'maka dengan ini, saya menganggap sebarang bayaran kalau ada sebagai dihilangkan (forfeited), oleh yang demikian saya juga menetapkan sebarang perjanjian diantara syarikat saudara dengan saya jikalau ada adalah dibatalkan (annulled).'

(2) Why should the defendant be forfeiting any payment unless there is money to forfeit pointing to a sale transaction?

(3) How did Berdikari come up with the figure of RM1,137,500 as the sale price of the land as shown by the letter (P7), and the testimony of PW3?

(4) Why did the defendant try to obtain Berdikari Directors' affidavit affirmation that there was an intention to sell but no payment was received by the defendant if there really was a sale of the property (see P13)?

(5) (a) How would the defendant explain P50 where a telephone conversation with the District Officer of Labuan was recorded stating that the defendant was pressing for the registration of the club because 'the club has bought some property and is now negotiating another piece of land to be purchased'?

We agree with the learned judge that the following evidence is most damning to the defendant. Was the defendant lying to the Parliamentary Privileges Committee, in May 1984, when he made a statement and he declared that he is only a trustee to the land? How can he now assert that he is the true owner? It is trite law that one has to be truthful in Parliamentary matters.

The learned judge at p 38 of the appeal record held:

75 The defendant even denied in Parliament on 28 May 1984 that he is the owner of the land. He told the Privileges Committee that the land belongs to the LGC (see P40), with the defendant saying: '... Itu rekod sahaja ... kepunyaan golf club. Mereka beri nama saya menjaga kerana takut gaduh-gaduh'. Thus a bare trustee:

A Datuk Harris bin Mohd Salleh: Jadi saya ada satu title di sini untuk rekod. No (1) tadi, saya mengaku nama saya, saya mahu rekodkan di sini Title 207521589 seluas 74.68 ekar ialah golf course yang mana saya mesti mempunyai nama di situ. Itu rekod sahaja — golf course sudah dipakai di situ 8 tahun, golf course sudah dibuat, kepunyaan golf club. Mereka beri nama saya menjaga kerana takut
B gaduh-gaduh. Now, summing up, boleh saya summing up?

76 With respect, perhaps needless to say the defendant's admission in Parliament lends more credence to the plaintiffs' case that the defendant knows that he is only a trustee of the land and that it is more likely than not that he has also been paid off for the land.

C In the Court below, at the close of the plaintiff's case, the defendant's counsel intimated to the trial judge that he would only be making a submission of no case to answer. The defendant, if they wanted to do that, must elect to stand on his submission and was not calling witnesses. In the case of *Simirah v Chua Hock Lee & Anor* [1963] MLJ 239, the Court of Appeal quoted with approval the practice in *Laurie v Raglan Building Co Ltd*
D [1942] 1 KB 152 at p 154 and *Yuill v Yuill* [1945] P 15 that when defence counsel is about to make a submission of no case to answer he must elect that he will call no evidence and that the judge should refuse to rule unless he make the election. Upon our questioning the appellant's counsel on this he made a statement from the Bar that the defendant had duly elected and he was, therefore, bound by his election and if he failed so be it.

E After hearing of submission of no case to answer the learned judge found for the plaintiff and duly granted the prayers prayed for. He held in his long judgment:

Conclusion

83 The oral and documentary evidence led by the plaintiffs points, on a
F preponderance of evidence and on a balance of probabilities, irresistibly that the plaintiffs have made a case against the defendant for the defendant to answer and since the defendant has elected not to adduce any evidence the defendant fails: *International Times* [1980] 2 MLJ 86 (FC) and therefore I give judgment in favour of the plaintiffs against the defendant.

G *Declaration/Judgment*

84 Declaration/Judgment for the plaintiff against the defendant as follows:

(1) the defendant holds the land as a bare trustee for and on behalf of the plaintiff who is rightfully entitled to have its name registered on the land title held as Town Lease No 207512589.

H (2) the plaintiff possesses an irrevocable licence in equity to permanently occupy and remain on the land and enjoy all the benefits thereof.

(3) The defendant is bound by proprietory or promissory estoppel and/or estoppel by conduct not to resile from his obligation to convey and transfer the land into the name of the plaintiff, forthwith.

I (4) the defendant is not entitled to remain as the registered proprietor of the land, the name of the defendant be expunged from the land title of the land and the same be rectified by the name of the plaintiff substituted in place thereof, forthwith.

(5) the defendant to transfer the land into the name of the plaintiffs and/ or plaintiff's trustee, forthwith.

(6) the defendant is to pay costs to the plaintiffs.

85 I do grant stay of execution pending appeal.

After hearing submissions of both counsel, we say, it is trite law that we should be slow in interfering with the finding of the learned trial judge. With respect in this instant, we come to the conclusion that the learned trial judge, based on the evidence before him, had found, at para 48, of his judgment thus:

> 48 Now that the defendant has not come forward to answer any of the questions, I agree with the submission by plaintiff's counsel that this is a factor to be taken into account. In *Jones v Dunkell* (1958–1959) 101 CLR 298 Menzies J said that 'where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstances that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference.

As we said the learned judge has correctly decided this matter. For the reasons given in the learned judge's judgment, with which reason we fully agree, we hereby dismiss this appeal and affirm the order made by the learned judge with costs to be taxed. The deposit is to be paid to the respondent on account of taxed costs.

Appeal dismissed.

Reported by Joel Ng